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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

TIME, INC.,

*Appellant,*

*against*

JAMES J. HILL,

*Appellee.*

*ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.*

## APPELLEE'S MOTION TO DISMISS OR AFFIRM

MILTON BLACK,
LEONARD GARMENT,
DONALD J. ZOELLER,
20 Broad Street,
New York, New York 10005,
*Attorneys for Appellee.*

NIXON, MUDGE, ROSE, GUTHRIE & ALEXANDER,
20 Broad Street,
New York, New York 10005,
*Of Counsel.*

October 13, 1965.

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## APPELLEE'S MOTION TO DISMISS OR AFFIRM.

Appellee moves to dismiss this appeal from a judgment of the Court of Appeals of the State of New York, entered on April 15, 1965, as amended on May 27, 1965, which affirmed a judgment by the Appellate Division in appellee's favor. In the alternative, appellee moves to affirm the judgment of the Court of Appeals. The basis for this motion is that the appeal does not present a substantial federal question for review by this Court.

### Counter-statement of Question Presented.

Does the First Amendment prevent the State of New York from awarding damages to an individual whose name has been used without his consent in a deliberately fabricated and basically false magazine article prepared and

published for advertising purposes and for the purposes of trade?

(This counter-statement of the question presented is made necessary because appellant's statement assumes findings and holdings in the courts below, which were never made, and which would have been contrary to the evidence).

## History of Case

In the February 28, 1955 issue of LIFE Magazine, a photo-article was published about the opening of a play entitled The Desperate Hours which stated that this drama was inspired by, and constituted a reenactment of, the true-life experience of appellee and his family with three escaped convicts in 1952 (Separate Ex. 10). Appellee and his wife, Elizabeth Selfridge Hill, instituted suit in October, 1955, alleging that the foregoing article involved commercial exploitation rather than a news use, and therefore violated Sections 50 and 51 of the New York Civil Rights Law. A motion by appellant for summary judgment was denied by Special Term of the New York Supreme Court (*Hill* v. *Hayes,* 27 Misc. 2d 863, 207 N. Y. S. 2d 901) and the decision was affirmed by the Appellate Division, First Department (13 A. D. 2d 954, 216 N. Y. S. 2d 497). A jury verdict was rendered against appellant Time, Inc., awarding compensatory damages to appellee James J. Hill and to Elizabeth Selfridge Hill in the amounts of $50,000 and $75,000, respectively; and exemplary damages were awarded against appellant in the amount of $50,000 divided equally between appellee and his wife (335-36; references to the Record on Appeal will be by page numbers unless otherwise noted). A verdict was rendered in favor of defendants Joseph Hayes, Howard Erskine, and The Desperate Hours Company.

Defendant Time, Inc. appealed to the Appellate Division, First Department which modified the judgment on the law and in the exercise of discretion and ordered a new trial solely on the issue of damages. As so modified, the judgment below was affirmed. One justice dissented in part and voted to dismiss the complaint. (*Hill* v. *Hayes*, 18 A. D. 2d 485, 240 N. Y. S. 2d 286.)

Pursuant to a stipulation between the parties, the judgment as to Elizabeth Selfridge Hill was vacated, and the action as to appellee, James J. Hill was severed and continued. On October 23, 1963, judgment for $30,000 was awarded to appellee James J. Hill by the Court without jury (506-08).

Defendant, Time, Inc., appealed to the New York Court of Appeals, which affirmed on the majority and concurring opinions of the Appellate Division, two judges dissenting (15 N. Y. 2d 986, 207 N. E. 2d 604 (1965)).

## Statement.

Appellant's Jurisdictional Statement is based upon a fundamental misstatement of the Privacy Law of the State of New York, both generally and as applied to the facts of this case. The New York Privacy Law does not follow the so-called common law of privacy recognized in other American jurisdictions. See *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). The New York Privacy Law is statutory in origin and was carefully formulated so as not to violate Article 1, Section 8 of the New York State Constitution, which provides in part that "no law shall be passed to restrain or abridge the liberty of speech or of the press". In light of this constitutional safeguard of a free press, the New York Privacy Statute, both by its terms and by the consistent construction given it by

the New York courts, does not proscribe the use of a name in connection with the dissemination of news or matters of public interest. As distinguished from the common law of privacy recognized elsewhere, the New York Privacy Law does not impose liability merely because an individual's name or portrait has been used in a manner that is factually incorrect, or in bad taste, or dramatized, or of little social or education value, or no longer of current interest (see discussion pp. 16-17, *infra*). The New York Statute comes into play only where a name or portrait has been used "for advertising purposes or for the purposes of trade", i.e., where there has been "commercialization of [an individual's] personality through a form of treatment distinct from the dissemination of news or information." *Gautier v. Pro-Football, Inc.*, 304 N. Y. 354, 360, 107 N. E. 2d 488 (1952). (See discussion p. 17, *infra*.)

The judgments of the New York State courts in the present case have followed this clear and consistent line of statutory interpretation. Appellant was not found liable, as it suggests, for publishing an "inaccurate" item of news or public interest (Jurisdictional Statement p. 7). Rather, the courts below found, on substantial and convincing evidence, that in introducing appellee's name into its article, appellant was concocting a fictition for commercial and advertising purposes, rather than attempting to disseminate news. The spurious connection of appellant with The Desperate Hours was frankly described by one of appellant's employees as a "good gimmick" which would lend an aspect of "true life" drama to an otherwise routine play review (180-81).

Thus, the New York State courts found that appellant's article, in its use of appellee's name, was a commercial writing, outside the constitutional ambit. This holding,

well supported by the facts, does not present a constitutional question. Accordingly, this appeal should be dismissed.

## The Facts.

### 1. The Hill Incident.

In 1952, appellee and his family were held hostage in their home in Whitemarsh Township, Pa. (near Philadelphia) for a period of nineteen hours by three convicts who had escaped from Lewisburg Federal Penitentiary (27-29). This experience, while highly dramatic, was by no means unique. Evidence at the trial revealed that a sizeable number of similar incidents had occurred to other families throughout the United States both before and after the incident involving appellee and his family (97-101; 155; 171-73). All of these incidents received publicity. These incidents had many elements in common. If, in any way, appellee's experience might be said to be different from the other hostage incidents, the difference lay in the fact that the convicts, although desperate men, were extraordinarily polite and did not in any way molest the family, even refraining from the use of profane language in their presence (34-35). This unusual aspect of appellee's experience was noted a few days after the event by appellant's TIME Magazine in an article entitled "House Party" which focused on such light notes as the convicts' use of the family sewing machine to alter Mr. Hill's clothing to their own size (350-51), and their unusually deferential attitude toward the family (351), emphasizing the absence of violence and misconduct on the part of the convicts and concluding with the notation that Mr. Hill followed the fugitives' parting instructions and waited five hours "to call the police and tell them about his interesting house guests" (352).

The incident was widely reported in the press at the time but was soon forgotten. Appellee and his family cooperated in normal press coverage while the incident was current news; and in their interviews they attempted to put an end to speculation that sexual assaults or other violent events had taken place within the house (37-39). Thereafter, appellee and his family moved to a new community and made a deliberate effort to put the incident behind them (55; 60-61; 65-66). They rejected all proposals to publicize the incident for money or personal gratification (48-50; 63-66). They declined to collaborate on newspaper or magazine articles and turned down offers to appear on television programs, including the "Ed Sullivan Show" (49). Rejecting a request for a paid interview in 1954 (56-58), appellee wrote that, "For the best interests of our children we have felt that it was best to avoid any course of action that might remind them of our experience in September, 1952" (58; Ex. 8 at Case 369).

**2. The Writing of The Desperate Hours.**

In the Spring of 1953, while living in Bradenton Beach, Florida, Joseph Hayes wrote his novel, The Desperate Hours (92). The novel (and the play and motion picture based thereon) tells the story of the invasion of a suburban home by three escaped convicts. Prior to writing his novel, Hayes clipped a large number of news articles about actual hostage incidents, including an article about appellee and his family (97-98; 111-12; 152-53; 168-70). The novel was concededly not based upon any of these incidents, but was purely a work of the imagination shaped out of many elements—"the classic hostage theme, the many news and magazine accounts of homes * * * and families held hostage by convicts and criminals, and [Hayes'] own personal loca-

tion near the penitentiary" (102; 174). The name of the fictional family—Hilliard—was the name of the Chevrolet dealer in Bradenton Beach, Florida, where Hayes wrote The Desperate Hours (114-15).

The story as finally written is pure melodrama and the events are violent in the extreme. The convicts have contempt for their victims (Separate Ex. 15, pp. 29, 36, 40, 44) and their language toward the family is abusive and profane (*Id.*, pp. 52, 100, 122, 131-32, 168). The father is beaten several times (*Id.*, pp. 46, 82). The son is viciously manhandled (*Id.*, p. 46). The daughter is made to suffer insulting advances (*Id.*, pp. 47, 74-76, 130) and is forced to participate in a plot to procure the death of a police officer (*Id.*, pp. 151-52, 162). The mother and children are to be taken away by the criminals as hostages (*Id.*, pp. 67, 69-70, 170). The father and daughter are permitted to leave the house to perform assignments for the criminals (*Id.*, pp. 59-60, 101, 152), and the plot centers on the issue of whether the father will go to the police with his family held hostage. An innocent third party is killed by one of the convicts (*Id.*, pp. 104, 112), and the convicts themselves are killed as they leave the hostage home (*Id.*, pp. 176-78). The Desperate Hours is essentially different from appellee's experience. In its focus on violence and terror, it is much closer to a number of the other "true life" experiences known to author Hayes (99-100).

**3. The Preparation of the LIFE Article.**

Shortly after publication in 1954, The Desperate Hours was made into a motion picture and stage play (92). In the fall of 1954, the play went into production, with pre-Broadway tryouts scheduled in New Haven and Philadelphia (93; 119). At the time of the Philadelphia tryout,

LIFE's Entertainment Editor, Tom Prideaux, at the suggestion of Robert Montgomery, the play's director and one of its financial backers, became interested in the idea of providing pictorial coverage for the play in view of its unusual doubledecker stage setting, which Prideaux felt had "great photographic possibilities" (187-89). At about this time, Prideaux in a brief chance meeting with a free-lance reporter (who also knew Hayes), was informed that "the germ of the idea [of the play] was generated" by a real life incident or incidents (195) and that the play had "a substantial connection" with an incident that occurred near Philadelphia (190).

Although Prideaux sought no elaboration of this information, and did not even inquire as to its source, he immediately decided "to follow a pattern which we [LIFE] have from time to time adopted, of doing a restaging of incidents in the play away from the stage" (191; 193). Prideaux thereupon secured the cooperation of Hayes and The Desperate Hours Company—who considered coverage by LIFE Magazine "very important" publicity (116)—in locating the former Hill home near Philadelphia and in arranging to transport members of the play's cast there in order to photograph scenes from the play at the site of the Hill's experience (120-35; 194; 198-99; 202-03). Part of the costs of LIFE's photographic work were paid by The Desperate Hours Company (130-32).

**4. The False Involvement of Appellee in the LIFE Article.**

Throughout the collaborative effort between the play's producers and LIFE Magazine, LIFE made no attempt to determine what, if any, connection the play had with appellee's experience (195-96; 199; 201-02; 223-24). It proceeded on the "assumption" that there was a connection (*Ibid.*). The LIFE editor, Prideaux, testified that he

did not feel "it was necessary or appropriate" to attempt to verify this assumption (201). The "story file" of the LIFE article produced at trial did not contain a single clipping on the Hill incident (213-15). The only report of the incident in the entire TIME-LIFE "morgue" was an article from The New York Times for September 13, 1952; and when examined in 1957, Prideaux had no recollection that he ever saw this article (212-13). For that matter, in his first draft of the article, he wrote that the Hill-incident convicts had escaped from "KOMING" penitentiary, a Time, Inc. code indication for information that was "coming"—despite the fact that Lewisburg penitentiary was mentioned in The New York Times article and in almost every other account of the incident (210-12; Ex. B at Case 413; Ex. 2 at Case 350; Separate Exs. C and D).

However, LIFE's story file did contain an envelope of New York drama reviews and one other news clipping that Prideaux admitted reading at this time (214-16). That was a copy of Hayes' article in The New York Times for January 30, 1955, which stated that The Desperate Hours was not inspired by any one real-life incident, did not involve research into any particular case, and contained a story that was "distinct from all the other hostage stories [Hayes] had ever encountered" (Ex. G at Case 415-18). More than raising a doubt as to Prideaux's alleged assumptions about the relationship between appellee's experience and The Desperate Hours, this article flatly contradicted the premise of the planned LIFE feature story; but Prideaux did not communicate with Hayes after reading it. The New York Times article was ignored by Prideaux for the obvious reason that he and his associates on LIFE Magazine knew from the outset that there was no real connection between the Hill family and The Desperate Hours. This is the only explanation for Prideaux's otherwise mystifying testimony

that during all of his personal conferences with Hayes, he never once discussed the underlying premise upon which the proposed article was to be based.

LIFE did not select the Hill experience for use in the photo-coverage of the play in the belief that the Hill experience was similar to, or the specific inspiration for, Hayes' story. It knew this was not so. The selection of the Hill experience was purely the result of the coincidence that the play had its pre-Broadway tryout in Philadelphia near the former Hill home, rather than in Detroit or Omaha, or some other location which would have placed it near the scene of one of the many other "true life" incidents (193).

**5. Additional Evidence That the LIFE Article Was a Deliberate Commercial Fiction.**

When Prideaux started to draft the captions and text for the LIFE article, the basic problem was to justify the use of the Hill house as a setting for The Desperate Hours, despite his knowledge that there was no real connection between the two. He straddled this editorial problem by minimizing to some extent the involvement of appellee and his family in the article and emphasizing the author, Hayes, and The Desperate Hours (Ex. 20 at Case 373). LIFE's Copy Editor, Joseph Kastner, whose important function is to ensure a consistent editorial tone throughout the magazine (237), felt that Prideaux's first draft was not "newsy enough" (239). Accordingly, he shifted the entire emphasis of the LIFE article's text from Hayes and The Desperate Hours to the Hills and the Whitemarsh incident (Exs. 20-24 at Case 370-401). On what basis he did this, when he had no contact with the incident or the play, is not known, for Prideaux had no recollection of what was said in this connection (238-39), and Kastner (who was available and attended the trial) did not testify (275).

Additional changes were made in other drafts with the object of making appellee's experience, rather than The Desperate Hours, the subject of the LIFE Magazine article. For example, Prideaux's "running head" for the article—a statement of its basic subject matter—was changed from "The Desperate Hours" to "True Crime" (Cf. Ex. 20 at Case 371-72; and Separate Ex. 10). This meticulous editing procedure carried the false involvement of appellee with The Desperate Hours to the absolute physical limit. Not a word in the article, as published, states or even suggests that The Desperate Hours is anything but a dramatic documentary inspired by the Hill incident and adhering faithfully to the facts thereof. (The pages of the various drafts of the LIFE article indicating the changes made thereon were introduced into evidence at the trial (Exs. 20-24) and Prideaux was examined extensively concerning these changes and the considerations which motivated them (205-12; 233-40; 249-61). All of this evidence was available to the New York appellate courts.)

Prideaux's basic idea of identifying the Hill family with The Desperate Hours was approved by LIFE Magazine's Managing Editor before the article was drafted (203-05). That connection was false and known to be false by all concerned. An editorial decision was made to state that false connection in the most effective, i.e., "newsy" manner. Prideaux's first draft did not convey that meaning clearly or exactly. The final product—under the supervision of Prideaux's senior editors—did.

The preparation of the LIFE article exemplifies the magazine's basic editorial techniques as described by its Managing Editor, Edward K. Thompson, in a 1955 foreword to a book entitled How LIFE Gets The Story, namely, the ability to convey "exact meanings"; the ability to cap-

italize on "breaks"; and a willingness to be "bold" and take risks (Ex. 31 at Case 406-09). "True-life" coverage of plays and motion pictures is a standard editorial technique of LIFE Magazine (247-48; Ex. 29 at Case 402-05). Its purpose is to give impact to the description of entertainment events by relating them to actual persons or events. It was shown below that in covering plays and motion pictures which were undeniably related to specific real-life persons, LIFE researched the facts, obtained documents or other first-hand factual data, consulted with the interested parties or their relatives, and then used precise words to describe the relationship between fact and fiction and to convey other editorial nuances (243; 245-46; Separate Exs. 26, 27, 28, 30). LIFE noted that "The Winslow Boy" was "inspired" by the *Archer-Shee* case, but contained some "fictional embellishments" (244-45; Separate Ex. 27); and that "They Were Expendable" involved a romance of "dubious accuracy" (245-48; Separate Ex. 28). The leading article in LIFE Magazine for February 14, 1955—i.e., just two weeks before the article on The Desperate Hours—combined the story of a woman claiming public recognition as the true-life Princess Anastasia, and the documentary facts about the actual Princess, in a lengthy review of the play "Anastasia" which was described therein as a "frankly fictional" drama (241-43; Separate Ex. 26). In applying this technique to its pictorial coverage of The Desperate Hours, LIFE was faced with the problem that the play bore no true relationship to a single real-life person or event. LIFE, nevertheless, undertook to make its "true-life" point in the most effective manner possible without regard to the facts.

Thus, the evidence below established that:

(1) The Desperate Hours was not the story of appellee's 1952 experience, or a dramatic reenactment thereof, nor

was it specifically inspired by that experience—and, accordingly the basic premise of the LIFE article was false.

(2) Appellant knew that the LIFE article—insofar as the use of appellee's name was concerned—was a fabrication, but despite that knowledge edited the photographs, headlines and text of the article so as to convey the impression that The Desperate Hours was a dramatic reenactment or account of appellee's experience.

(3) Appellee's experience, his name, and former home, were used to furnish the impact of realism to both the LIFE article and The Desperate Hours, and thereby served the commercial interests of appellant and the author and producers of The Desperate Hours.

The article thus involved a combination of trade and advertising purposes. It used appellee's name in order to advance the mutual commercial interests of appellant and the producers of The Desperate Hours. The producers were interested solely in promoting the play's opening, and coverage by LIFE Magazine in a "true-life" fashion represented a valuable form of advertising. They collaborated in the preparation of the article by locating appellee's former home, consulting with LIFE on photographic problems, making the cast and stagehands available, and paying the stagehands' overtime charges. From LIFE's standpoint, the use of the Hill name, incident and former home made for a dramatic format that would have great appeal for its readers; and the relationship of the appellee and his family to The Desperate Hours was deliberately falsified in order to utilize this device most effectively. In every respect, the particular use of appellee's name in the LIFE article bore the earmarks of commercial contrivance, rather than the dissemination of news.

As to all of these matters, there was little, if any, opposing evidence presented by appellant. Its case basically rested upon alleged "similarities" between the Hill incident and The Desperate Hours which were said to justify the particular use made of appellee's name in the LIFE article. This same list of "similarities" is now appended to appellant's Jurisdictional Statement, in a final attempt to relitigate the facts of this case. The so-called "similarities" represent superficial details which have nothing to do with the plot of The Desperate Hours. Such matters as warnings to the captive family, theft of civilian clothing, the use of the radio by the convicts, breaking through a roadblock, etc. are literary cliches. A list of numerous dissimilarities between the Hill incident and Hayes' work could be set forth, and lists of "similarities" could, of course, be compiled from other actual incidents. Appellant's list of "similarities" and its argument in relationship thereto were presented to the courts below. At the trial and in appellee's briefs below it was pointed out that in assembling its "similarities" argument appellant distorted minute particulars of the incident, the novel and the play in order to strengthen the impression of similarity, and that the alleged "similarities" played no part in the preparation of the LIFE article but were developed after the event as a theory of defense to appellee's claim (see e.g., 294). After weighing these arguments in light of the evidence adduced at the trial, the trial court, the Appellate Division and the Court of Appeals concluded that the LIFE article involved a commercial, not a news, use of appellee's name.

# ARGUMENT.

## I.

**The judgment below does not present a substantial First Amendment question.**

In 1902 the Court of Appeals of the State of New York held that there was no common law right of privacy in New York. *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). In response to *Roberson*, the New York State Legislature in 1903 enacted Sections 50 and 51 of the New York Civil Rights Law, which have come to be known as the New York Privacy Statute. Acting under the limiting influence of Article 1, Section 8 of the New York State Constitution ("no law shall be passed to restrain or abridge the liberty of speech or of the press"), the New York Legislature undertook to enact a statute which would not restrict the right of the press to disseminate news or matters of public interest. The reach of the new law was confined to unauthorized exploitation of a name or portrait for commercial purposes, i.e., "for advertising purposes, or for the purposes of trade". The New York Privacy Law was held constitutional by this Court in *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502 (1911).

Since its enactment, the statute has been consistently construed by the New York State courts so as to effectuate the legislative intention to preserve the "news privilege". The development of constitutional safeguards in the application of the Privacy Law is outlined in *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 106 N. Y. S. 2d 553, 556-7 (1st Dept. 1951):

> "The cases decided in the almost fifty years since the enactment of this statute have established certain

guideposts for the application of the broad language of the statute. Claims based on use of a name or a picture 'for advertising purposes', for example, have received much more liberal treatment than those grounded on use 'for purposes of trade'.

"The difference in approach is not without reason. The compelling public interest in the free flow of ideas in the market place does not extend to advertising matter.

* * * * * *

"A more difficult question is presented, however, in determining whether the present use was 'for the purposes of trade'. In defining this phrase, the cases have established categories of immunity and liability. Cognizant of the overriding social interest in the dissemination of news, an almost absolute privilege has been extended to the use of names and pictures in connection with the reportage of news. Use of a name or photograph is granted immunity whether it appears in a newspaper [citation omitted]; a newsreel [citation omitted]; a magazine [citation omitted]; or even a comic book [citation omitted]. Once an item has achieved the status of newsworthiness it retains that status even when no longer current [citations omitted]. Moreover, courts will not undertake the dangerous task of passing value judgments on the contents of the news [citation omitted]. The deliberation of the United Nations and the chit-chat of a society editor receive equally the protection of the privilege [citation omitted]."

Further, it is well established in New York that where a name or portrait is actually used in the reportage of news or matters of public interest, the fact that it may be inaccurate will not result in liability under the privacy law. *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct. N. Y. Co.), *aff'd* 272 App Div. 759, 69 N. Y. S. 2d 432 (1st Dept. 1947). Nor will liability

result from the mere fact that a dramatic form is used. *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 41 M. 2d 43, 244 N. Y. S. 2d 701 (Sup. Ct. N. Y. Co.), *aff'd* 19 A. D. 2d 865, 244 N. Y. S. 2d 1 (1st Dept. 1963). What is proscribed is the "unauthorized use of a name or picture to sell a collateral commodity" or "the unauthorized fictional use of a name or photograph." *Koussevitzky* v. *Allen, Towne & Heath, supra,* 68 N. Y. S. 2d at 783. The statute comes into effect only where the publisher is not attempting to tell news or inform the public about the individual at all, but is merely appropriating plaintiff's name or portrait for the purpose of lending "human interest" or impact to commercial writing.

Appellant is wrong, therefore, when it argues that the New York law of privacy was developed "in a climate that did not feel the presence of the First Amendment" (Jurisdictional Statement, p. 8). Whatever may be the rule in other jurisdictions, represented by such cases as *Leverton* v. *Curtis Pub. Co.*, 192 F. 2d 974 (3rd Cir. 1951); *Mau* v. *Rio Grande Oil Company*, 28 F. Supp. 845 (N. D. Cal. 1939); and *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931), cited in the Jurisdictional Statement (pp. 9-10), New York, guided by constitutional principles, has followed its own path and carved out an extremely limited right of action.

Appellant is also wrong in suggesting that *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (2d Cir. 1940) states a different and more narrow interpretation than that adopted by the New York courts (Jurisdictional Statement, pp. 9-10; 21). *Sidis* involved a biographical sketch of a once-famous personality. The sketch limited itself "to the unvarnished, unfictionalized truth". (113 F. 2d at 810.) The court, relying entirely on New York authorities, held that the Privacy Statute, as construed by the New York courts, did not proscribe such an article. There was no occasion for

*Sidis* to "speak in constitutional terms" (see Jurisdictional Statement, p. 9) since the New York Privacy Law involved no encroachment on the freedom of the press. That the New York courts apply a constitutional standard at least as stringent as that applied in *Sidis* appears from *Koussevitzky* v. *Allen, Towne & Heath, Inc., supra,* where it was held that a biography of a famous person was not actionable even though it contained many factual inaccuracies and related stories about the plaintiff, "some avowedly apocryphal, others of doubtful reliability." (68 N. Y. S. 2d at 784.) *Koussevitzky* stated the settled New York rule that "Truth or falsity does not, of itself, determine whether the publication comes within the ban of Sections 50 and 51." (188 Misc. at 484, 68 N. Y. S. 2d at 783.)

The foregoing principles are no longer open to question in New York. In their application, the courts determine, on a case by case basis, whether a name or likeness has been used in the telling of news, or in a work of fiction or in an advertisement. Labels are not controlling. What appears to be an article of general interest may really be an "advertisement in disguise" (*Griffin* v. *Medical Society of the State of New York,* 7 Misc. 2d 549, 11 N. Y. S. 2d 109 (Sup. Ct. N. Y. Co. 1939)); what appears to be a biography may really be a fictional work, utilizing a real person as a prop (*Spahn* v. *Julian Messner, Inc.,* 43 M. 2d 219, 250 N. Y. S. 2d 529 (Sup. Ct. N. Y. Co. 1964), *aff'd* 23 A. D. 2d 216, 260 N. Y. S. 2d 451 (1st Dept. 1965). On the other hand, even the unauthorized use of a name or likeness in an advertisement is not actionable, where a contrary finding would hamper the press in its dissemination of news (*Booth* v. *Curtis Publishing Company,* 15 A. D. 2d 343, 223 N. Y. S. 2d 737 (1st Dept.), *aff'd* 11 N. Y. 2d 907, 228 N. Y. S. 2d 468 (1962); *Humiston* v. *Universal Film Mfg. Co.,* 189 App. Div. 467, 178 N. Y. Supp. 752, 759 (1st Dept. 1919)). In each case,

the New York courts look through the form of the publication to determine whether liability may be imposed without interfering with the news privilege.

The general rules outlined above were carefully and correctly applied in the present case. The evidence revealed that the LIFE article did not republish the Hill incident and use appellee's name as a reference or illustration, or as a part of a historical article, or even as the subject of an embellished report of the incident itself. Appellee and his family were used as the basis for a staged publicity article for a commercial event. The effect of the article was to identify appellee and his family—falsely—as the true life counterparts of the fictional family in The Desperate Hours and to associate them with the violence and sensationalism of the fictional novel, play and motion picture. Appellant introduced appellee into its "True Crime" article not to describe an actual event either past or present but solely to fabricate an imaginary relationship which would make for a dramatic article. On the basis of this evidence, the majority opinion in the Appellate Division (which was adopted by the Court of Appeals) concluded (1) that "The article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had or might have a proper interest", and (2) that it was "inescapable" that appellee's name was introduced into the article "to advertise and attract further attention to the play, and to increase present and future magazine circulation as well" (499). This is not a case where a publication attempted to depict a true relationship and negligently failed to do so accurately. Here the publication was indifferent to the true relationship and, for purely commercial motives, simply proceeded to fabricate an interesting story. It is in this sense, as found by the state courts, that the LIFE article was "fictionalized".

The instant case does not present a question involving the freedom of the press to disseminate news. What is involved is the regulation by the state of the manner in which individuals may be incorporated into commercial writings. The states have wide latitude to regulate such writings. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942).

In the privacy area such regulation is predicated on "the need to protect the individual from selfish, commercial exploitation of his personality." *Gautier* v. *Pro-Football,* 304 N. Y. 354, 358, 107 N. E. 2d 485, 487 (1952). This Court has recently noted that the individual's "right to be let alone" is a privilege which falls within the penumbra of constitutional protection. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). In *Griswold* the Court struck down a state statute which, if applied, would have invaded the individual's privacy. The New York Privacy Law, which safeguards the individual's right to be let alone, consistent with free dissemination of news, accords the highest respect to the overall design of the Bill of Rights.

## II.

### This Court's decision in *New York Times* v. *Sullivan* has no bearing on the present case.

Appellant's reliance on this Court's recent decision in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), is misplaced. *Sullivan* involved the constitutional protection granted to public discussion of political questions. The Court there held that "the Constitution delimits a state's power to award damages for libel in actions brought by public officials against crities of their official conduct." We are willing to assume that the same constitutional limitation would govern privacy actions where comment on a public official is involved. No such question is involved in this

case. LIFE Magazine's fabricated photo-article about appellee is a far cry from the publication involved in *Sullivan.*

Moreover, by its terms, *Sullivan* is not applicable where the injurious publication was motivated by actual malice, i.e., where the defendant either knew of the falsity of the publication or acted with reckless disregard of the facts. In the present case, a basic element of appellant's liability was its indifference to the falsity of the connection it made between appellee and "The Desperate Hours". Indeed, author Hayes' New York Times article gave actual notice to appellant that there was no factual justification for its incorporation of appellee and his family in LIFE's "True Crime" article. This was the finding in the Trial Court, the Appellate Division and the Court of Appeals. Accordingly, even were this case to involve comment within the scope of *Sullivan,* the judgment below would still be constitutionally valid.

## Conclusion.

This appeal does not present a substantial Federal question for review by this Court, and should be dismissed.

Respectfully submitted,

MILTON BLACK,
LEONARD GARMENT,
DONALD J. ZOELLER,
20 Broad Street,
New York, New York 10005,
Attorneys for Appellee.

NIXON, MUDGE, ROSE, GUTHRIE & ALEXANDER,
20 Broad Street,
New York, New York 10005,
Of Counsel.

October 13, 1965.